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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re ALBERT SASSER,

on Habeas Corpus.

B224785

(Los Angeles County
Super. Ct. No. BH006495)

APPEAL from an order of the Superior Court of Los Angeles County.
Peter Paul Espinoza, Judge. Reversed.

Edmund G. Brown, Jr. and Kamala Harris, Attorneys General, Julie L. Garland, Senior Assistant Attorney General, Anya M. Binsacca and Amanda Lloyd, Deputy Attorneys General, for Appellant.

James M. Crawford, under appointment by the Court of Appeal, for
Respondent.

In 1983, Albert Sasser was convicted of second degree murder and sentenced to an indeterminate term of 15 years to life in prison. Sasser was also convicted of

conspiracy to commit extortion, attempted extortion, and assault by force likely to produce great bodily injury. On February 25, 2009, the Board of Parole Hearings (the Board) found Sasser suitable and granted parole. The Governor reversed the Board's decision. In July 2009, the superior court granted Sasser's petition for a writ of habeas corpus, finding the Governor's reversal was not supported by some evidence that Sasser currently posed an unreasonable risk of danger to society if released. The Attorney General appealed from that order, contending the Governor's decision was supported by some evidence in the record.¹ (See *In re Rosenkrantz* (2002) 29 Cal.4th 616, 652.) Sasser contends any evidence in the record was not probative because it was based on historical factors alone. We reverse.

FACTUAL AND PROCEDURAL SYNOPSIS

I. Commitment Offense

In 1983, while in custody at the Los Angeles County Jail, Sasser participated in an extortion plot with several other inmates, who were identified as members of a local street gang. The extortion plot required inmates who were not members of the gang to pay \$5 per week to gang members; any inmate who did not contribute would be beaten.

After the non-gang inmates were informed of the requirements, Sasser and other gang members began collecting the money. The following day, Clifford Spears, a non-gang inmate, would not comply and, in a concerted and vicious attack, was beaten to near senselessness by Sasser and 14 other gang members. Sasser struck Spears in the face and body. At one point during the assault, everyone left the victim's cell after being warned a deputy sheriff was approaching. When no one appeared, Sasser and the other gang members re-entered the cell and resumed their violent attack on the victim.

¹ On November 1, 2010, this court reversed the superior court order with directions to dismiss the petition as moot because the Board had found Sasser unsuitable for parole on February 3, 2010. We vacated that opinion after the Supreme Court granted Sasser's petition for review and transferred the matter to this court to consider the appeal on the merits.

After the assault, Spears staggered from his cell toward the railing on the fourth floor of the jail. Gang members kicked Spears' legs out from under him, causing him to fall against the railing. Spears then either fell or jumped to the floor 14 feet below and collapsed. Spears died from blunt force trauma caused by multiple injuries to his head. Investigators found a handkerchief with Spears' blood in Sasser's cell.

II. Board Decision

The Board found Sasser suitable for parole after considering his commitment offense, his prior criminal history, his psychological evaluation and other information. The Board noted the commitment offense was heinous, but Sasser had shown remorse, understood the nature of his commitment offense, been discipline-free since 1996, participated in educational and vocation programs, and had realistic parole plans and a support network.

The Board noted the following factors. Sasser, who had been incarcerated for 27 years and was then 46 years old, was at an age that "reduces [his] recidivism risk." Sasser has realistic parole plans, "has transitional housing and he has everything in a support network that he needs in order to ensure that his transition is one of success." Sasser had received two vocations, one in graphic arts in 1995 and one as a paralegal in 2001. Sasser had completed his high school diploma in 1989 and received an AA degree in 2008. Sasser had work experience as a teaching assistant, a peer mentor in a substance abuse program, and a clerk in the kitchen and had worked in the laundry. All of Sasser's work performances had been above average to exceptional.

Sasser had been an active member in AA and NA for over 13 years and had completed numerous self-help courses, including anger management and bible studies. Sasser had completed courses including Amer-I-Can, child growth/development and parenting, creative conflict resolution workshop, H.O.P.E Through Recovery Substance Abuse Program, men's advisory council and Amity Substance Abuse Program. Sasser received training on working as a drug and alcohol counselor.

III. Governor's Decision

In his decision, the Governor acknowledged and discussed several suitability and unsuitability factors, including Sasser's commitment offense, criminal history and gang affiliation, history of substance abuse, prior discipline history and other institutional misconduct, educational and vocation training, self-help and therapy programming, volunteer work, parole plans, psychological evaluations and his attitude towards his commitment crime, including minimization, insight and acceptance of responsibility.

The Governor considered Sasser's criminal and prison disciplinary histories, noting Sasser was 19 years old at the time of the commitment offense and had "an extensive prior criminal record" dating back to age eight. The Governor recounted Sasser's criminal history, which included petty theft, disturbing the peace, robbery, unlawfully taking a vehicle, forgery, receiving stolen property and possessing a concealed weapon. The Governor noted Sasser's drug and alcohol history, including marijuana and PCP, and his gang membership through 1985. The Governor considered that "Sasser was disciplined eight times for rules violations, including the unauthorized acquisition or exchange of personal property, possessing contraband, falsifying documents, displaying aggressive behavior toward staff, disobeying orders, stabbing an inmate and weapon found in cell/destruction of state property" and that Sasser "was also counseled four times, most recently in 1994."

The Governor relied on the gravity of Sasser's commitment offense, finding it "was extremely brutal and callous. It involved the calculated ambush of an unarmed, unsuspecting man in his jail cell." The Governor noted Sasser "had several opportunities to avoid the life sentence, but he continued." The Governor referred to the Board's findings the beating was "heinous and merciless" and concluded "Sasser's actions demonstrated an exceptionally callous disregard for his victim's life and suffering."

As support for the latter position, the Governor noted Sasser initially told the probation officer that he did not observe anyone attack the victim and he only struck the victim in self defense after the victim lashed out when Sasser offered the victim a

handkerchief to wipe blood from his (the victim's) face. Sasser testified to the same story at trial. Following his incarceration, Sasser made varying statements about the circumstances of his commitment offense during his psychological evaluations. In the 1986, Sasser stated "he is not guilty of conspiracy, extortion, or means of force likely to produce great bodily injury"; in 1989, Sasser "admit[ted] to a level of participation in the death of the victim"; and in 1992, Sasser stated, "It was a very unfortunate situation, very sad for me. I did not push him over the rail and it simply happened in the mixed-up situation. I feel sad for myself having to go to prison like this and stay a long time." The 1992 psychologist found Sasser "still does not see his total responsibility in the murder charge, and he feels it is quite unfair he is the only one who got singled out and received a long sentence of 15 years-to-life."

In 1994, Sasser told the psychologist that he "takes full responsibility for his actions." However, in 1996, the same psychologist opined Sasser might "benefit from additional understanding of the relationship between various actions and consequences. He needs to better develop better understanding and improve his judgment." In 2000, Sasser finally "acknowledge[d] the official version of his offense" and admitted that "it took him 'some time' to come to a deeper realization of the crime and his role in it." But in 2005 and 2009, Sasser again told the psychologist and the Board that other people came up with the plan to extort money and confront the victim and he only struck the victim a few times and then left.

The Governor found Sasser's accounts of the crime conflicted with the facts contained in the record, i.e., the appellate opinion (described above). This court concluded Sasser's conduct reflected "not only an awareness of the plan to extort or assault inmates, but his direct participation in the execution of its purpose." Sasser denied any involvement in the extortion plot as late as his 2009 parole hearing. Based on those facts, the Governor concluded Sasser had "not gained sufficient insight into the circumstances of his offense nor has he fully accepted responsibility for his actions."

In Sasser's most recent 2008 psychological evaluation, the psychologist rated Sasser's level of psychopathy, "a trait that has been linked to episodes of repetitive

aggression and criminality,” in the moderate range. The psychologist rated Sasser’s overall propensity for future violence in the “moderate to low range when compared with similar inmates.” (Emphasis deleted.) The Governor noted, “Sasser’s general recidivism risk and his likelihood to violate parole were assessed as being in the medium range.” The Governor concluded, “The fact that Sasser’s risk assessments were almost uniformly elevated indicates that he continues to pose a current, unreasonable risk to public safety if released at this time.”

The Governor concluded: “The gravity of the crime supports my decision, but I am particularly concerned by Sasser’s elevated risk assessments and by the fact that he still minimizes his prior criminal conduct by not accepting full responsibility for his offense. This evidence indicates that Sasser still poses a risk of recidivism and violence and that his release from prison would pose an unreasonable risk to public safety.”

IV. Superior Court Order

The court found the Governor’s findings regarding Sasser’s commitment offense were supported by the record, but did not indicate a current risk of violence. The court further found that the record indicated Sasser had accepted responsibility for his crime and expressed remorse and that the elevated risk assessments included in the most recent (2008) psychological report did not provide some evidence that Sasser posed a current risk to public safety because they were based almost entirely on historical factors. The court ordered the Governor to vacate his decision, reinstated the Board’s decision and ordered Sasser be released in accord with the date calculated by the Board.

The Attorney General filed a timely notice of appeal from the order granting the petition. This court granted the Attorney General’s request to stay the superior court order.

DISCUSSION

In the case at bar, the Governor reversed the Board's decision that Sasser be released on parole. The superior court granted Sasser's petition for a writ of habeas corpus, finding the Governor's decision was not supported by some evidence in the record. Appellant contends the Governor's decision did not violate due process as it was supported by some evidence in the record. (See *In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 658.) Sasser contends the Governor did not rely on some evidence as there was no nexus between the factors used by the Governor and a finding he was currently dangerous.

I. Standard of Review

"Because the trial court's findings were based solely upon documentary evidence, we independently review the record." (*In re Rosenkrantz*, *supra*, 29 Cal.4th at p. 677.) "It is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors interrelate to support a conclusion of current dangerousness to the public. [¶] Accordingly, when a court reviews a decision of the Board or Governor, the relevant inquiry is whether some evidence supports the decision of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (Italics deleted.) (*In re Lawrence* (2008) 44 Cal.4th 1181, 1212.) The standard is "unquestionably deferential," and "limited to ascertaining whether there is some evidence in the record that supports the [Governor's] decision.'" (*Id.* at p. 1210; accord *In re Shaputis* (2008) 44 Cal.4th 1241, 1258 ["When a court reviews the record for some evidence supporting the Governor's conclusion that a petitioner currently poses an unreasonable risk to public safety, it will affirm the Governor's interpretation of the evidence so long as that interpretation is reasonable and reflects due consideration of all relevant statutory factors."].) Nonetheless, the standard "certainly is not toothless, and 'due

consideration' of the specified factors requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision -- the determination of dangerousness.” (*Lawrence*, at p. 1210.)

“Although ‘the Governor’s decision must be based upon the same factors that restrict the Board in rendering its parole decision,’ the Governor undertakes an independent, de novo review of the inmate’s suitability for parole. Thus, the Governor has discretion to be ‘more stringent or cautious’ in determining whether a defendant poses an unreasonable risk to public safety. ‘[T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor. . . . It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the Governor’s decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court’s review is limited to ascertaining whether there is some evidence in the record that supports the Governor’s decision.’”

(Citations & italics omitted.) (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1204.)

In essence, the Governor found Sasser’s commitment offense and criminal history remained probative in light of his elevated risk assessments, minimization of his crime, insufficient insight, and failure to fully accept responsibility for his actions. Thus, we discern there are three bases for the Governor’s decision: (1) the commitment offense; (2) Sasser’s lack of insight, including minimization of his crime and failure to accept full responsibility for his crime; and (3) the recent psychological evaluation.

II. Indicia of Dangerousness

A. Commitment Offense

“[T]he governing statute [Pen. Code, § 3041, subd. (b)] provides that the Board must grant parole unless it determines that public safety requires a lengthier period of incarceration for the individual because of the gravity of the offense underlying the conviction.” (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 654.) The Governor found Sasser’s commitment offense was especially heinous, brutal and callous. The Board made a similar finding. There is no contention to the contrary on appeal. However, we note there was no finding by the Board that the commitment offense was committed under stress. (Compare *In re Lawrence, supra*, 44 Cal.4th at p. 1225.)

In *Lawrence*, the Supreme Court noted that “the Legislature explicitly recognized that the inmate’s threat to public safety could be minimized over time by changes in attitude, acceptance of responsibility, and a commitment to living within the strictures of the law.” (*In re Lawrence, supra*, 44 Cal.4th at pp. 1219-1220.) The court concluded that “although the Board and the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of current dangerousness to the public unless the record also establishes that something in the prisoner’s pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner’s dangerousness that derive from his or her commission of the commitment offense remain probative of the statutory determination of a continuing threat to public safety.” (Italics deleted.) (*Id.* at p. 1214; see also *In re Shaputis, supra*, 44 Cal.4th at pp. 1254-1255 [“[T]he relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense. This inquiry is, by necessity and by statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time

or the attendant changes in the inmate's psychological or mental attitude."].)

Sasser quotes *In re Tripp* (2007) 150 Cal.App.4th 306, 320, that the "denial of release solely on the basis of the commitment offense warrants especially close scrutiny." In the case at bar, the Governor did not reverse the Board solely on the basis of the commitment offense. Thus, the issue before us is whether some fact, in addition to the nature of the commitment offense, supports a finding Sasser was currently dangerous to public safety.

B. Evaluations

The Governor found, "The fact that Sasser's risk assessments were almost uniformly elevated indicates that he continues to pose a current, unreasonable risk to public safety if released at this time." Sasser argues that finding is not some evidence of current dangerousness because it was based on historical factors.

In Sasser's most recent 2008 psychological evaluation, the psychologist rated Sasser's level of psychopathy, "a trait that has been linked to episodes of repetitive aggression and criminality," in the moderate range. The psychologist rated Sasser's overall propensity for future violence in the "moderate to low range when compared with similar inmates." The Governor noted, "Sasser's general recidivism risk and his likelihood to violate parole were assessed as being in the moderate range."

Though the psychologist cited historical factors, he also stated his assessment was based on Sasser's entire prison record and statements made by Sasser during his evaluation. The psychologist stated: "These estimates take into account the inmate's cultural background, personal, social and criminal history, institutional programming, community/social support, release plans, and current clinical presentation."

Sasser's extensive criminal history, which started at a young age, prior to his commission of the commitment offense as well as his prison disciplinary record, which included stabbing an inmate, though not sufficient to provide a nexus to current dangerous by themselves, corroborate the existence of some evidence.

C. Sasser's Insight

“By statute, it is established that the gravity of the commitment offense and petitioner’s current attitude toward the crime constitute factors indicating unsuitability for parole.” (*In re Shaputis, supra*, 44 Cal.4th at p. 1246.)

Recently, in *In re Taplett* (2010) 188 Cal.App.4th 440, the court discussed cases in which an inmate’s lack of insight rendered the circumstances of the commitment offense relevant to the current level of dangerousness. In one case, the inmate had not accepted responsibility for her personal participation in the beating of the victim, and in another case, the inmate’s racial hatred rendered the circumstances of the offense still probative to the inmate’s current level of dangerousness. (*Id.* at pp. 449-450.) In her description of the factors underlying the commitment offense, Taplett, who was the driver in a drive-by shooting by her friend Cynthia Feagin, stated she did not think Feagin meant to kill the victim. (*Id.* at p. 448.) In Taplett’s evaluation, her insight had been rated as adequate. (*Id.* at p. 444.)

In reviewing the Governor’s reversal of the Board’s decision to release Taplett on parole, the court reasoned that: “Despite having entered a plea to second degree murder, with the requisite element of an intentional killing, Taplett continues to deny she had any such intent. Her description of the circumstances leading to the murder also differ markedly from the facts of the offense as related by other witnesses. Taplett insists she thought Feagin intended only to fight the victim, despite the fact Taplett intentionally pursued the victim even after Feagin took a shot at the victim’s vehicle.” (*In re Taplett, supra*, 188 Cal.App.4th at p. 450.) The appellate court concluded Taplett’s failure to accept the full extent of her responsibility for the murder rendered the circumstances of the commitment offense relevant to her current level of dangerousness and supported the Governor’s reversal of the Board’s grant of parole. (*Id.* at p. 450.)

It is not uncommon for an inmate to initially deny responsibility and then later, after participation in rehabilitation programs, to accept responsibility. (See *In re Lee* (2006) 143 Cal.App.4th 1400, 1413-1414 [It is the genuineness of the prisoner’s acceptance of responsibility not its timing that is relevant].)

However, in the case at bar, it took time for Sasser to admit his role in the crime and accept responsibility, but then he recanted by denying his role in the extortion plot.

Sasser gave varying accounts of his role in the death of Spears. Sasser initially stated he did not observe anyone attack the victim and he only struck the victim in self defense. During his psychological evaluations, Sasser made varying statements about the circumstances of his commitment offense. In 1986, Sasser stated “he is not guilty of conspiracy, extortion, or means of force likely to produce great bodily injury”; in 1989, Sasser “admit[ted] to a level of participation in the death of the victim”; and in 1992, Sasser stated, “It was a very unfortunate situation, very sad for me. I did not push him over the rail and it simply happened in the mixed-up situation. I feel sad for myself having to go to prison like this and stay a long time.” The 1992 psychologist found Sasser “still does not see his total responsibility in the murder charge, and he feels it is quite unfair he is the only one who got singled out and received a long sentence of 15 years-to-life.”

In 1994, Sasser told the psychologist that he “takes full responsibility for his actions.” However, in 1996, the same psychologist opined Sasser might “benefit from additional understanding of the relationship between various actions and consequences. He needs to better develop better understanding and improve his judgment.” In 2000, Sasser finally “acknowledge[d] the official version of his offense” and admitted that “it took him ‘some time’ to come to a deeper realization of the crime and his role in it.” But then in 2005 and 2009, Sasser backtracked and again told the psychologist and the Board that other people came up with the plan to extort money and confront the victim and he only struck the victim a few times and then left.

In addition, at the 2009 Board hearing, Sasser stated: “When Mr. Spears was confronted about his gang membership and that’s how the fight had initiated. He was confronted where he was from. I guess he had gave a response that one of the individuals didn’t like. The fight started and then I got involved in the fight.” Thus, Sasser eliminated any reference to the extortion plot of which this

court found Sasser was a part. In other words, even though Sasser accepted responsibility for the death of Spears, he did not accept responsibility for his role in the extortion plot -- the reason Sasser was in Spears's cell in the first place. This change supports a reasonable inference Sasser did not fully accept responsibility for his crimes. The appellate opinion states that Sasser had been part of a group of gang members who took money from inmates the day before the attack on Spears. Sasser admitted that his early criminal behavior both in and out of prison was partly based on a need to be accepted by a gang. It is the lack of insight into the full nature of his crimes and the need for approval that have implications for his future dangerousness.

After all, "it is not the circumstance that the crime is particularly egregious that makes a prisoner unsuitable for parole -- it is the implication concerning future dangerousness that derives from the prisoner having committed that crime." (*In re Lawrence, supra*, 44 Cal.4th at pp. 1213-1214.) "[T]he relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are probative to the central issue of current dangerousness when considered in light of the full record." (Italics deleted.) (*Id.*, at p. 1221.)

In the instant case, the Governor did consider all the relevant factors in reaching his decision, and his interpretation of the evidence, though different from that of the Board, was reasonable. There were no extenuating circumstances pertinent to Sasser's commitment offense. The totality of the circumstances provides the required some evidence supporting the Governor's decision. In particular, Sasser's lack of insight provides the nexus to possible current dangerousness. Accordingly, the order granting Sasser's petition for a writ of habeas corpus is reversed.

DISPOSITION

The order granting the petition for a writ of habeas corpus is reversed.

WOODS, J.

We concur:

PERLUSS, P. J.

JACKSON, J.